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Florida's Regulation of Child Exploitation: Senate Bill 1442

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FLORIDA'S REGULATION OF CHILD EXPLOITATION: SENATE BILL 1442

Laura R. Salpeter*

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I. INTRODUCTION

Child pornography has “a devastating and lasting effect on children” emotionally and physically.¹ Under Florida law, child pornography is defined as “any image depicting a minor engaged in sexual conduct.”² Sexual conduct is, in part, conduct such as: “deviate sexual intercourse, sexual bestiality, masturbation, . . . sadomasochistic abuse, [sexual battery], actual lewd

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1. Nat'l Ctr. for Missing & Exploited Children, Child Pornography, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1504 (last visited Apr. 4, 2009) [hereinafter Missing Kids].

2. FLA. STAT. § 847.001(3) (2007).

exhibition of the genitals, [and] actual physical contact with . . . clothed or unclothed genitals.”³ With the increasing use of technology, the Internet has provided our society with great knowledge and opportunity to learn.⁴ However, it has also greatly increased the sexual exploitation of children, more specifically, the continuance of viewing and distribution of sexually exploited children.⁵ Prior research exhibits that more than seventy-seven million children are connected to the Internet, and one in seven of those children have been solicited by a sexual predator online.⁶ Further, recent statistics indicate that child pornographic material on the Internet has grown to reach estimates of as much as twenty percent.⁷

Both Congress and the states have enacted laws in an attempt to control the issue of sexual exploitation of children.⁸ However, few laws have survived the First Amendment and the United States Commerce Clause arguments raised by civil rights groups.⁹ Due to the invalidation of much child exploitation legislation, Congress and the states struggle to narrowly construct provisions of new bills in order to protect children.¹⁰ Despite the constitutional issues raised by civil rights groups, the 2008 Florida Legislature, having a strong governmental interest in protecting children, passed Senate Bill 1442 (SB 1442) to provide additional protection to victims of child pornography both in civil and criminal proceedings.¹¹

This article discusses the history and issues surrounding child exploitation laws and the changes SB 1442 intends to make. This article will first present an overview of the child exploitation problem and discuss the development and progression of legislation both federally and in the State of Florida. Next, this article will analyze the constitutionality of SB 1442. In order to determine the constitutionality of SB 1442, this article will discuss both the First Amendment and the Commerce Clause of the United States Consti-

3. *Id.* § 847.001(16).

4. Missing Kids, *supra* note 1.

5. *Id.*

6. Office of Att’y Gen. of Fla., Child Predator CyberCrime Unit, <http://myfloridalegal.com/pages.nsf/Main/DF75DF6F54BDA68E8525727B00645478> (last visited Apr. 4, 2009) [hereinafter CyberCrime Unit].

7. Missing Kids, *supra* note 1.

8. See Richard H. Martin, Comment, *State Regulation of Pornographic Internet Transmissions: The Constitutional Questions Raised by Senate Bill 144*, 29 FLA. ST. U. L. REV. 1109, 1109 (2002).

9. See *id.* at 1109–10.

10. See generally *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

11. See Fla. S. Comms. on Crim. and Civil Just. Appropriations, Judiciary, Crim. Just., and Senators Dockery and Baker, CS for SB 1442 (2008) Bill Analysis and Fiscal Impact Statement 1 (Apr. 15, 2008) (on file with comms.) [hereinafter SB 1442 Bill Analysis and Impact Statement].

tution. This article will additionally evaluate the impact of SB 1442 on the victims and the State of Florida. Finally, this article will conclude with recommendations toward any present or potential concerns surrounding SB 1442.

II. HISTORY AND PRESENT SITUATION OF CHILD PORNOGRAPHY LAW

Until the mid-1800s, “children were viewed primarily as chattel” and not people.¹² Children were seen as expendable, replaceable, and exchangeable and therefore, children’s rights were non-existent.¹³ Parents or guardians, “under most Western legal systems,” were entitled to sell, beat, and exploit their children.¹⁴ The shift from negative societal attitudes of children began in the nineteenth century and was based upon the concern of care and protection for the child.¹⁵ This new ideology was emphasized by philosophers who proposed that children were malleable and needed to be surrounded by positive experiences.¹⁶ Nationally, this concern grew from the establishments of orphanages and schools to the protection of sexually exploited children.¹⁷

The various rights of children need to be respected and upheld by legislation and the practices of society.¹⁸ In order for these rights to be respected, both Congress and the states have enacted legislation in an attempt to monitor and control society.¹⁹ However, technology and the growing use of the Internet for means of communication have led to abundant grounds for child pornographers and the need for new legislation.²⁰

A. *The Use of the Internet*

The Internet has provided our society with a new medium of communication which has led to a vast amount of knowledge and opportunity.²¹ However, the Internet has also dramatically impacted the growing problem

12. Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 9 (1993).

13. *See id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *See Cohen, supra* note 12, at 9.

18. *See Martin, supra* note 8, at 1109–11.

19. *See id.*

20. *Id.* at 1109–10.

21. *Missing Kids, supra* note 1.

of the sexual exploitation of children.²² The eruption of the Internet has significantly complicated law enforcement abilities to control the exchange of pornographic material.²³ According to the National Center for Missing and Exploited Children (NCMEC):

A greater number of child molesters are now using computer technology to organize and maintain their collections of these illegal images. In addition they are also using the Internet to increase the size of these collections. . . . When these images reach cyberspace, they are irretrievable and can continue to circulate forever. Thus the child is revictimized as the images are viewed again and again.²⁴

According to the Online Victimization Report, which surveyed over fifteen hundred children, one in five children are solicited while online.²⁵ Further, the survey indicated that one in thirty-three children are aggressively solicited with attempts to contact the child offline through mail, telephone, or meeting with the child in person.²⁶ However, very few incidents were ever reported to a parent or the authorities.²⁷ One theory is that molesters will gradually introduce sexual images or “content into their online conversations” in an attempt to “lower the child’s inhibitions.”²⁸ Once the child believes that his or her peers have engaged in these sexual activities, he or she begins to see the behavior as acceptable and is more willing to participate.²⁹ Now that the sexual exploitation has taken place, the molester has the ammunition to blackmail the child for expansion of his or her collection.³⁰ The Internet has become a valuable tool for molesters to reach a level of respect from other molesters.³¹ For example, once a personally manufactured image has been placed on the Internet, the respect status is achieved and other molesters will begin trading their own illegal images among fellow exploiters.³²

22. *Id.*

23. Mehagen Doyle, *Bad Apples in Cyberspace: The Sexual Exploitation and Abuse of Children over the Internet*, 21 WHITTIER L. REV. 119, 120 (1999).

24. Missing Kids, *supra* note 1.

25. DAVID FINKELHOR ET AL., ONLINE VICTIMIZATION: A REPORT ON THE NATION’S YOUTH ix (2000), available at http://www.missingkids.com/en_US/publications/NC62.pdf.

26. *Id.*

27. *See id.*

28. Missing Kids, *supra* note 1.

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.*

A number of children found an encounter with a molester distressing, whether sexual exploitation occurred or not.³³ In order to reduce these encounters, our society needs to better protect the children, increase the number of incidences reported to authorities, and educate both parents and children on the problem of sexual exploitation and the Internet.³⁴

B. *Federal Law and the Exploitation of Children*

Congress, in recent years, has passed numerous amounts of legislation in an attempt to protect children from sexual exploitation.³⁵ The first of Congress's attempts occurred in 1996 when the Communications Decency Act of 1996 (CDA) was passed.³⁶ The CDA was passed as part of the Telecommunications Act of 1996 and prohibited knowingly transmitting pornography to children.³⁷ Specifically, the CDA regulated access to sexually explicit "obscene or indecent" material on the Internet by criminalizing the sending or displaying in an accessible area of such material to anyone under the age of eighteen.³⁸ However, in 2000, in *United States v. Playboy Entertainment Group, Inc.*,³⁹ the United States Supreme Court found the CDA unconstitutional because it violated First Amendment rights.⁴⁰ More specifically, the Court agreed that the CDA was overly broad and vague because while there is a "governmental interest in protecting children from harmful materials, . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults."⁴¹

Congress additionally enacted the Child Pornography Prevention Act of 1996 (CPPA) to expand child pornography laws to prohibit virtual child pornography.⁴² This Act was overruled in *Ashcroft v. Free Speech Coalition*⁴³ because the Court found that the CPPA "abridges the freedom to engage in a substantial amount of lawful speech [and] is overbroad and unconstitutional"

33. See FINKELHOR ET AL., *supra* note 25, at ix, 1.

34. *Id.* at ix.

35. Martin, *supra* note 8, at 1111.

36. *Id.*

37. *Id.* at 1111-12 (citing 47 U.S.C. § 223(a) (1994)).

38. *Id.* at 1112 (citing 47 U.S.C. § 223(a) (1994)).

39. 529 U.S. 803 (2000).

40. *Id.* at 827.

41. Reno v. ACLU, 521 U.S. 844, 875 (1997).

42. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified as amended in scattered sections of 18 U.S.C.).

43. 535 U.S. 234 (2002).

under the First Amendment.⁴⁴ Therefore, the Court held that virtual child pornography was not grounds to find actual child pornography.⁴⁵

Due to the unconstitutionality of the CDA, Congress passed the Child Online Protection Act (COPA).⁴⁶ COPA was intended to limit the scope of material “harmful to minors.”⁴⁷ In particular, COPA required commercial websites to inquire about the user’s age before allowing him or her to enter the Internet site, thereby prohibiting any entity or individual in knowingly making available any sexually explicit material that would be considered “harmful to minors.”⁴⁸ Similar to the CDA and the CPPA, COPA was examined on the basis of vagueness and unconstitutionality.⁴⁹ The United States Court of Appeals for the Third Circuit determined COPA was overly broad and unconstitutional and the United States Supreme Court upheld the lower court’s decision.⁵⁰

During the litigation of COPA, Congress passed the Children’s Internet Protection Act (CIPA), which required school libraries receiving any federal technology funds to install software on their computers that blocked pornography.⁵¹ The American Library Association argued that the Act was unconstitutional on its face and the United States District Court for the Eastern District of Pennsylvania agreed.⁵² However, the United States Supreme Court held that CIPA was constitutional because school libraries are required to make determinations regarding the material viewable on the Internet and CIPA only supported the libraries’ duty to make content based decisions viewed by patrons.⁵³

Congress has further enacted legislation for the protection of children against predators in an attempt to prevent the sexual exploitation altogether.⁵⁴ For example, Congress passed the Prosecutorial Remedies and Other Tools

44. *Id.* at 256.

45. *See id.* at 258.

46. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 230-31).

47. *See id.* § 231(e)(6) (“The term ‘material that is harmful to minors’ means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene . . .”).

48. *Id.* § 231(a).

49. *ACLU v. Ashcroft (ACLU II)*, 542 U.S. 656, 670-673 (2004).

50. *ACLU v. Ashcroft (ACLU I)*, 322 F.3d 240, 271 (2003), *aff’d* 542 U.S. 656 (2004).

51. Children’s Internet Protection Act, 47 U.S.C. § 254(h)(1)(B) (2000).

52. *Am. Library Ass’n v. United States (Library I)*, 201 F. Supp. 2d 401, 407, 495 (E.D. Pa. 2002).

53. *United States v. Am. Library Ass’n (Library II)*, 539 U.S. 194, 208 (2003).

54. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 1, 117 Stat. 650, 650 (codified as amended in scattered sections of 18 U.S.C.).

to End the Exploitation of Children Today Act (PROTECT) in 2003, which expanded law enforcement wiretapping authority.⁵⁵ PROTECT was intended to prevent child abduction and sexual exploitation, instead of punishing the violators.⁵⁶

Additionally, Congress, in their attempts for prevention, enacted the Children's Online Privacy Protection Act of 1998 (COPPA).⁵⁷ COPPA prevented any commercial website from accessing any personal information from a child under the age of thirteen.⁵⁸ Although COPPA does limit online material to children, it fails to limit a child's ability to claim an age of legality without verification.⁵⁹

Furthermore, Congress passed the Adam Walsh Child Protection and Safety Act of 2006 (AWCPS) in response to violent crimes related to sexual exploitation of children.⁶⁰ This Act aims to prevent child abuse and child pornography and to encourage and promote Internet safety.⁶¹ Masha's Law is a provision within the AWCPS, which provides a civil remedy for victims of child pornography, both minors and adults, from those offenders who have downloaded the victim's images and raises the minimum penalty from fifty thousand dollars to one hundred fifty thousand dollars.⁶²

Moreover, Congress has taken additional steps in order to protect children of other countries.⁶³ In 2006, Congress enacted 18 U.S.C. § 2423, which forbids any United States citizen from traveling abroad to engage in sexual activity with a minor.⁶⁴ Further, that same day, Congress enacted 18 U.S.C. § 2422, which bans the use of the mail, Internet, or other means to persuade, coerce, or entice any person under the age of eighteen in unlawful sexual behavior.⁶⁵

In addition to Acts passed by Congress, many states have attempted to enact legislation to address child exploitation issues. There still remains a

55. *See id.* § 201.

56. *See generally id.* §§ 101–108.

57. Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-728 (codified at 15 U.S.C. §§ 6501–6506).

58. *Id.* §§ 1302–1303.

59. *See id.*

60. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §1, 120 Stat. 587, 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

61. *Id.*

62. 18 U.S.C. § 2255 (2006).

63. *See* 18 U.S.C. § 2423(b) (2006).

64. *Id.*

65. 18 U.S.C. § 2422(b) (2006).

need for a state legislation that can withstand the constitutional challenges of either the First Amendment or the Commerce Clause in federal court.⁶⁶

C. *Florida Law and the Exploitation of Children*

According to the Federal Internet Crimes Against Children Task Force, “Florida ranks fourth in the nation in volume of child pornography.”⁶⁷ In response, Attorney General Bill McCollum (McCollum) began the Child Predator CyberCrime Unit in 2005.⁶⁸ The purpose of this unit is to increase the safeguard precautions taken to ensure the prevention of child pornography, Internet-based sexual exploitation, and the prosecution of sexual predators.⁶⁹ The success of this unit has led to the arrests of more than fifty child predators or facilitators of child pornography.⁷⁰

The Child Predator CyberCrime Unit has opened the doors for Florida to enact legislation to guarantee the unit’s success.⁷¹ For example, the CyberCrimes Against Children Act of 2007 was enacted through the efforts of McCollum and made the State of Florida a leader in the fight to end the sexual exploitation of children.⁷² This Act increases the penalties for the possession or distribution of Internet child pornography and creates a penalty for those predators who actually travel to meet a child with “the specific purpose” of exploiting them.⁷³ The Act also increases the penalties for “grooming”⁷⁴ themselves to seduce a child.⁷⁵ The success of this Act has led to the expansion of the CyberCrime Unit, with locations throughout the State of Florida.⁷⁶

In 1990, the Florida Legislature enacted the Conditional Release Program Act which provides that certain re-offenders, including sexual exploitation offenders, are subject to terms and conditions established by the commission after their release from the correctional institution.⁷⁷ Further, in

66. See generally *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

67. CyberCrime Unit, *supra* note 6.

68. *Id.*

69. *Id.*

70. *Id.*

71. See generally *id.*

72. CyberCrime Unit, *supra* note 6.

73. *Id.*

74. See *id.* (stating that “‘grooming’ is intended to make a child believe the offender is closer in age to the child, therefore encouraging the child to feel more comfortable conversing with the offender”).

75. *Id.*

76. See *id.*

77. FLA. STAT. § 947.1405(1)–(2)(c) (2007).

1997, the Conditional Release Program Act was amended to include stricter restrictions for sex offenders.⁷⁸ These conditions included: prohibitions from operating a motor vehicle, using a post box office, taking an annual polygraph test, a submission to an HIV test, and the use of an electric monitor if the commission deemed it necessary.⁷⁹

Furthermore, after the kidnap, rape, and murder of nine-year-old Jimmy Ryce, the Florida Legislature passed the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators Act (Jimmy Ryce Act).⁸⁰ This Act is intended to deem certain sex offenders as “sexually violent predators” in which they are involuntary and indefinitely committed to a mental health facility after they have served time in the correctional facility.⁸¹ This Act only applies to offenders “who have been convicted of a sexually violent” crime prior to the new offense.⁸²

The State of Florida recognized that when innocent people suffer any personal injury or death in an effort to prevent criminal activity, they may incur negative impacts such as: disabilities, financial hardships, or the need of public assistance.⁸³ Therefore, Florida enacted the Florida Crimes Compensation Act in 2007.⁸⁴ This Act is intended to aid, care, and support victims of crime.⁸⁵ It also provides a way for innocent children who are subjected to exploitation to receive assistance from the Florida Attorney General’s Division of Victim Services.⁸⁶

Further, the State of Florida enacted the Computer Pornography and Child Exploitation Prevention Act which criminalizes knowingly: transmitting, viewing, enticing, luring, seducing, or soliciting any child or parent of a child by computer to obtain obscene material pertaining to the sexual exploitation of children.⁸⁷ Additionally, this Act punishes any person who travels or attempts to travel to meet a child with the intention to engage in unlawful sexual conduct with the child.⁸⁸

Florida, having “the nation’s third highest population of sex offenders,” became the first State to enact statewide residence restrictions against sexual

78. *See id.* § 947.1405(7)(b).

79. *Id.*

80. FLA. STAT. §§ 394.910–.932 (2007).

81. *Id.* § 394.910.

82. *Id.* § 394.925.

83. *See* FLA. STAT. § 960.002 (2007).

84. *Id.* § 960.01.

85. *Id.* § 960.0021(2)(a).

86. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 4–5.

87. *See* FLA. STAT. § 847.0135(1), (3) (2007).

88. *Id.* § 847.0135(4).

predators whose victims were children.⁸⁹ While a majority of states have enacted one statute for sex offenders, Florida maintains two different statutes: one for general sexual offenders and a “more stringent set of restrictions” for sexual predators.⁹⁰ The restrictions against general sex offenders prohibit certain sex offenders “in which the victim of the offense was less than [sixteen] years of age, to reside within 1000 feet of any school, day care center, park, or playground.”⁹¹ However, these restrictions apply only to those sex offenders convicted for the offense on or after October 1, 2004.⁹² The restrictions against sexual predators are more severe and apply to a smaller category of sex offenders than general sex offenders.⁹³ Sexual predators are classified as those “who present an extreme threat to . . . public safety.”⁹⁴ Those labeled sexual predators and whose victims were under the age of eighteen at the time of the crime are prohibited from “living within 1000 feet of a school, daycare center, park, playground, [public school bus stops], or other place[s] where children regularly congregate” if the convicted crime was committed on or after October 1, 1995.⁹⁵

Moreover, Florida has enacted many state statutes in an attempt to control the sexual exploitation of children. For example, *Florida Statutes* section 92.56 provides that the confidentiality of the victim of child exploitation is protected from civil and criminal proceedings and the State may use a pseudonym⁹⁶ for the victim in a sexual exploitation case.⁹⁷ Additionally, *Florida Statutes* section 775.082 provides minimum penalties for criminals, including sexual exploitation, who reoffend by punishing them to life in prison or death.⁹⁸ Further, *Florida Statutes* section 948.31 requires an evaluation to determine whether certain sex offenders are in need of a probationer or outpatient counseling program.⁹⁹ If deemed necessary, the court will pro-

89. See Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1188 (2006).

90. *Id.* at 1160–61.

91. FLA. STAT. § 794.065(1) (2007).

92. *Id.* § 794.065(2).

93. Wernick, *supra* note 89, at 1162.

94. FLA. STAT. § 775.21(3)(a) (2007). “Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety.” *Id.*

95. Wernick, *supra* note 89, at 1162.

96. FLA. STAT. § 92.56 (2007). Keeping confidential “[a]ll court records, including testimony from witnesses, that reveal the photograph, name, or address of the victim.” *Id.* § 92.56(1).

97. *Id.*

98. FLA. STAT. § 775.082(1) (2007).

99. FLA. STAT. § 948.31 (2007).

vide an outpatient counseling requirement for a term or indefinite condition.¹⁰⁰

Florida has become “one of the leading states” in the nation fighting child exploitation and enacting legislation to prevent and protect children.¹⁰¹ However, although Florida has taken a stand, the fight against child exploitation has only begun. Both federal and state legislation must continue to grow with the quickly changing times and revolutionized technology.

III. SENATE BILL 1442

In the 2008 session, the Florida Legislature enacted Senate Bill 1442 (SB 1442), which provides additional protections to victims of child exploitation “in civil and criminal proceedings, as well as a civil remedy for victims of child pornography.”¹⁰² Specifically, SB 1442: 1) allows the victim to protect his or her confidentiality by allowing “the use of a pseudonym in court records and proceedings;” 2) removes stricter requirements for conviction of the offender and lessens the proof for conviction to “the person selling or transferring the custody of a minor knew that the minor being sold would engage in prostitution, perform naked for compensation, or otherwise participate in the trade of sex trafficking;” 3) relocates a provision in *Florida Statutes* section 800.04(7)(b) to the computer pornography statute in *Florida Statutes* section 847.0135(5); 4) requires law enforcement officers to provide material found during investigation to the Child Victim Identification Program (CVIP) within the National Center for Missing and Exploited Children (NCMEC); 5) “[r]equires prosecutors to enter certain information into the Victims in Child Pornography Tracking Repeat Exploitation database;” 6) creates a civil remedy for victims of child pornography and guarantees these victims minimum damages of one hundred and fifty thousand dollars; 7) permits “the Office of the Attorney General to pursue cases on behalf” of victims; 8) amends the Florida Crimes Compensation Act to expand the definition of “crime;” and 9) allows victims to file a victim’s compensation claim.¹⁰³

SB 1442 is patterned after “Masha’s Law” found in the federal Adam Walsh Child Protection and Safety Act of 2006, which gives a civil remedy against offenders who download the victim’s child pornography images.¹⁰⁴ Masha’s Law was named after Masha Allen whose abuse was distributed

100. *See id.*

101. CyberCrime Unit, *supra* note 6.

102. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

103. *Id.* at 1–2, 5.

104. *See* 18 U.S.C. § 2255 (2006).

worldwide on the Internet when she was sexually abused by her adoptive father Matthew Mancuso.¹⁰⁵ Prior to Masha's Law, civil penalties for sexual exploitation of a child were less than the penalty for downloading music illegally.¹⁰⁶ Masha's Law successfully increased the monetary damages from a minimum of fifty thousand dollars to one hundred fifty thousand dollars and allowed minors to recover damages while they were still under the age of eighteen.¹⁰⁷ With the passage of SB 1442, Florida has become the first state to allow victims of child pornography to recover civil damages in a Florida-based court from offenders who download images of their sexual exploitation.¹⁰⁸

IV. CONSTITUTIONAL ISSUES SURROUNDING SENATE BILL 1442

While many states have attempted to control the growing issue of child exploitation, few have succeeded. With the increasing use of technology and the ability to communicate via the Internet, state enacted legislation of child pornography has come under constitutional attack for violations of freedom of speech and interfering with interstate commerce.¹⁰⁹ Freedom of speech is a constitutionally protected right under the First Amendment.¹¹⁰ Legislation may deprive a person from freely expressing himself or herself if it prohibits against a "clear and present danger", child pornography, or obscenity.¹¹¹ Further, Article I, Section 8 of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹¹² A state law will be held unconstitutional if it places an undue burden on interstate commerce, is discriminatory, or is preempted by federal law.¹¹³

105. Office of Att'y Gen. of Fla., *McCollum, Legislators: Victims of Child Pornography Deserve Voice in Court, Civil Damages*, Feb. 19, 2008, <http://myfloridalegal.com/newsrel.nsf/newsreleases/224531D54E6EB873852573F400567E2B> [hereinafter *McCollum*].

106. *Id.*

107. 18 U.S.C. § 2255.

108. *McCollum*, *supra* note 105.

109. *See generally* ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999).

110. U.S. CONST. amend. I.

111. *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982); *see also* Brandenburg v. Ohio, 395 U.S. 444, 449–50 (1969).

112. U.S. CONST. art. I, § 8.

113. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978).

A. *The First Amendment Implications*

To guarantee freedom of speech, the First Amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech;” however, this right is not absolute.¹¹⁴ Content-based regulations of speech¹¹⁵ are typically held unconstitutional and are subjected to strict scrutiny.¹¹⁶ Nevertheless, the regulation of speech will be sustained under the First Amendment if: the government has a compelling interest to regulate the speech; it is narrowly tailored to meet a compelling state interest; and the regulation is the least restrictive alternative.¹¹⁷ Further, any regulation encroaching on speech that imposes a criminal penalty must be “adequately defined” by state law and requires scienter.¹¹⁸ SB 1442 regulates the images of child pornography and therefore, is a content-based regulation and will be subjected to strict scrutiny.¹¹⁹

1. The State’s Interest in Regulation

The United States Supreme Court has consistently held obscene material to be outside the scope of the protections of the First Amendment.¹²⁰ The Court recognized that the original states prosecuted for “libel, blasphemy, and profanity.”¹²¹ Further, throughout history the Court has “remained firm in the position that ‘the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.’”¹²² In *New York v. Ferber*,¹²³ the Supreme Court identified five rationales to why “the States are entitled to greater leeway in the regulation of pornographic depictions of children.”¹²⁴ First, the state has a compelling interest in “safeguarding the physical and

114. U.S. CONST. amend I.

115. See *Ferber*, 458 U.S. at 763–64 (explaining that content-based regulations of speech are accepted if “the evil to be restricted so overwhelmingly outweighs the expressive interests”).

116. See, e.g., *People v. Foley*, 731 N.E.2d 123, 131 (N.Y. 2000).

117. *Id.* (citing *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

118. See *Ferber*, 458 U.S. at 764–65.

119. See SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1–2.

120. E.g., *Ferber*, 458 U.S. at 764.

121. *Id.* at 754.

122. *Id.* at 754–55 (quoting *Miller v. California*, 413 U.S. 15, 18–19 (1973)).

123. *Id.* at 747.

124. *Id.* at 756.

psychological well-being of a minor.”¹²⁵ Second, research indicates that child pornography is directly linked to the abuse of children.¹²⁶ Third, the marketing and promotion of child pornography provide an economic motive that is essential to the production of such illegal material and it is unlikely that freedom of speech extends to a violation of a criminal statute.¹²⁷ Fourth, child pornography and children engaged in lewd acts do not constitute an important literary, educational, or scientific purpose. “[T]he value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not *de minimis*.”¹²⁸ Lastly, classifying child pornography outside the scope of what is protected by the First Amendment freedom of speech is not inconsistent with precedent.¹²⁹

Research indicates the use of children for pornographic material is harmful to the physical, psychological, and emotional health of the child.¹³⁰ The child victim may experience: genital bruising, lacerations, depression, anger, withdrawal, nightmares, pelvic and back pains, feelings of guilt and responsibility, betrayal, and low self esteem.¹³¹ Legislative judgment has repeatedly found relevancy in combating child pornography and has sustained legislation to protect the physical, psychological, and emotional health of children, even where freedom of speech is questioned.¹³² SB 1442 is intended to provide additional protections to victims of child pornography in both criminal and civil proceedings to further the prevention of sexual exploitation and abuse, and therefore, violators of SB 1442 fall outside the scope of the First Amendment protections.¹³³

Child pornography is directly linked to child abuse in such that it supplies a permanent record of the initial occurrence and the harm is intensified by the distribution of the material.¹³⁴ This distribution of material must be eliminated in order to control the sexual exploitation of children.¹³⁵ Therefore, the most practical approach to eliminate the production of child pornography is to impose criminal penalties and prosecute those who advertise, sell, promote, encourage, and support the product. SB 1442 creates a new

125. *Ferber*, 458 U.S. at 756–757 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

126. *Id.* at 759.

127. *Id.* at 761–62.

128. *Id.* at 762.

129. *Id.* at 763.

130. *See Ferber*, 458 U.S. at 758 & n.9.

131. *Missing Kids*, *supra* note 1.

132. *E.g.*, *Ferber*, 458 U.S. at 758.

133. *See* SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1–2.

134. *Ferber*, 458 U.S. at 759.

135. *Id.*

civil remedy that allows the recovery of damages from those who produce, promote, or possess illegal images concerning the victim.¹³⁶ The First Amendment does not limit a state in prosecuting those who promote, possess, or encourage the exploitation of children;¹³⁷ therefore, SB 1442 falls within the permissible scope aimed at protecting children.

Title 18, section 2251 of the United States Code makes it a federal offense for “[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.”¹³⁸ Additionally, the interest of the First Amendment to support the distribution of commercial material, which would normally outweigh a governmental interest in regulation, does not apply when the commercial activity is illegal.¹³⁹ Therefore, the restrictions SB 1442 places on the marketing and promotion of child pornography are imperative to the valid limitation it places on the production of child pornography.

The First Amendment extends to material that provides an important and necessary scientific, educational, or literary purpose.¹⁴⁰ The Court in *Ferber* indicated that it is unlikely child pornography and the sexual depictions of children exhibiting lewd conduct would provide any important and necessary scientific, educational, or literary purpose; and the First Amendment interest is narrowly limited to those works portraying children that are important and necessary.¹⁴¹ SB 1442 proscribes lewd or lascivious exhibition of children over the Internet to the computer pornography statute in section 847.0135 of the *Florida Statutes*, computer pornography,¹⁴² which legislative judgment has previously deemed to have “exceedingly modest, if not *de minimis*” value.¹⁴³

The determination of what classification of speech is “protected by the First Amendment . . . depends on the content of the speech” that is being regulated.¹⁴⁴ Any legislation that impinges on speech must be adequately defined by state law or authoritatively construed.¹⁴⁵ However, a content-based classification of speech may fall outside the protection of the First Amendment because the restriction significantly “outweighs the expressive

136. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 7.

137. See *Ferber*, 458 U.S. at 764–65.

138. 18 U.S.C. § 2251 (2006).

139. *Ferber*, 458 U.S. at 761–62.

140. *Id.* at 762–63.

141. *Id.*

142. See FLA. STAT. § 847.0135 (2007).

143. See *Ferber*, 458 U.S. at 762.

144. *Id.* at 763 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976)).

145. *Id.* at 764.

interests.”¹⁴⁶ Child pornography has been recognized by precedent as a category outside the scope protected by the First Amendment.¹⁴⁷ SB 1442 stands for the position to safeguard the welfare of children by specifically providing for civil and criminal protections,¹⁴⁸ and it is permissible to consider the material SB 1442 aims to secure without the protection of the First Amendment.

2. Means and Ends

The regulation of speech will be sustained under a First Amendment challenge if the statute is narrowly tailored to meet a compelling state interest.¹⁴⁹ In other words, the statute must not be overbroad or vague.¹⁵⁰ Any regulation of speech must be adequately defined in such a manner that a person of common intelligence can decipher between whether his or her “contemplated conduct is lawful” or criminal in nature.¹⁵¹ A statute that is vague fails to warn a person that a conduct is criminal and is subject to First Amendment challenges.¹⁵² Further, a statute which regulates more speech than regulation allows under the Constitution is said to be overbroad and will be subjected to the overbreadth doctrine.¹⁵³

There are two ways in which a statute may be challenged for vagueness: on its face and as applied.¹⁵⁴ If the legislation prohibits a constitutionally protected right, then the facially vague challenge applies.¹⁵⁵ If the law does not have sufficient clarity to the conduct prohibited or fails to warn a person that the conduct is criminal, then the legislation is challenged as applied.¹⁵⁶

In order to determine vagueness, the statute must be examined in a contextual background, analyzing the full law and understanding the intention of the law.¹⁵⁷ If the legislation “fails to draw reasonably clear lines”¹⁵⁸ to the conduct being prohibited and does not provide a “fair and non-discriminatory

146. *Id.* at 763–64.

147. *Id.* at 756.

148. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

149. *People v. Foley*, 731 N.E.2d 123, 131 (N.Y. 2000) (citing *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

150. *Id.* at 128–30.

151. *State v. Maxwell*, 825 A.2d 1224, 1230 (N.J. Super. Ct. Law Div. 2001) (quoting *State v. Cameron* 498 A.2d 1217, 1219 (N.J. 1985)).

152. *See id.*

153. *See People v. Arndt*, 814 N.E.2d 980, 994 (Ill. App. Ct. 2004).

154. *Maxwell*, 825 A.2d at 1230.

155. *See id.*

156. *See id.* at 1230–31.

157. *Id.* at 1230.

158. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

application of the laws,”¹⁵⁹ then the legislation will be void for vagueness. SB 1442 specifies provisions it intends to broaden, amend, replace, and create. Further, SB 1442 identifies specific purposes of each provision, the conduct considered illegal, and the remedies available to the victims.¹⁶⁰ Moreover, SB 1442 leaves no hypothetical application of the law and explicitly states the minimum amount a victim will receive with a successful claim.¹⁶¹

The overbreadth doctrine prohibits the government from banning constitutionally unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.¹⁶² In order for legislation to be considered overbroad, it must “significantly compromise” a fundamental right.¹⁶³ The overbreadth doctrine should only be used as a last resort and has been depicted as a “strong medicine.”¹⁶⁴ Further, commercial activity, such as advertising and promoting, rarely will be susceptible to the overbreadth doctrine.¹⁶⁵ SB 1442 provides protections to victims of child pornography and punishes those who promote, produce, or possess images involving victims of child pornography.¹⁶⁶ The conduct of promoting, advertising, or producing images that exploit children is an unlawful conduct and, therefore, does not have any constitutional protections.¹⁶⁷ Further, because SB 1442 regulates a commercial activity, it is unlikely that the overbreadth doctrine is enforceable.¹⁶⁸

3. Least Restrictive Alternative

Even if a state has a compelling interest in the regulation it seeks to enforce, it must still be the least restrictive method to achieve the state’s purpose.¹⁶⁹ If there is a less restrictive method of regulation that is equally as effective and accomplishes the same purpose as the state’s legislation, then

159. *Kreimer v. Bureau of Police for the Town of Morrison*, 958 F.2d 1242, 1266 (3d Cir. 1992).

160. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 6.

161. *Id.* at 9–10.

162. *New York v. Ferber*, 458 U.S. 747, 772 (1982).

163. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

164. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

165. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976).

166. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 2.

167. *People v. Arndt*, 814 N.E.2d 980, 994 (Ill. App. Ct. 2004).

168. *See generally* SB 1442 Bill Analysis and Impacts, *supra* note 11.

169. Pamela J. Stevens, Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S. CAL. L. REV. 693, 697–98 (1982).

the legislation is unconstitutional under the First Amendment.¹⁷⁰ Debatably, the only effective means of regulating child exploitation is a ban of pornography in totality.¹⁷¹ However, courts are unlikely to ban an entire industry of sales when the use of an alternative might be equally as effective, and therefore, state legislation is aimed at protecting children by regulating the production, possession, and distribution of child exploitation.¹⁷²

The distribution of child pornography has long been seen as a victimless crime, and thus, victims did not receive rights under civil or criminal law.¹⁷³ Specifically, defendants argue that “minors depicted [in child pornography] were not ‘directly and most seriously affected’ by [the] transmission of the pictures.”¹⁷⁴ Contrary to this argument, courts have identified three ways in which the distribution of child pornography is directly harmful to the victim.¹⁷⁵ First, “[t]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”¹⁷⁶ Therefore, the continuance of sexual exploitation of the child is directly linked to the distributor and possessor of child pornography.¹⁷⁷ “Second, the mere existence of child pornography represents an invasion of the privacy of the child depicted.”¹⁷⁸ The distribution and possession of child pornography invades the privacy interest and continues the “disclosure of personal matters.”¹⁷⁹ Lastly, “the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials.”¹⁸⁰ In other words, the production of child pornography could not exist without the promotion and distribution of child pornography and vice versa.¹⁸¹ Therefore, the possession, promotion, or distribution of child pornography is directly correlated to the victimization of the child.¹⁸²

The regulation of child pornography seeks “to prevent the abuse and misuse of children.”¹⁸³ Evidence illustrates that “the ‘victimization’ of the

170. *Id.*

171. *Id.* at 698.

172. *Id.*

173. *See* United States v. Tillmon, 195 F.3d 640, 644 (11th Cir. 1999).

174. *Id.*

175. United States v. Norris, 159 F.3d 926, 929–30 (5th Cir. 1998).

176. *Id.* at 929 (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).

177. *Id.* at 930.

178. *Id.*

179. Whalen v. Roe, 429 U.S. 589, 599 (1977).

180. Norris, 159 F.3d at 930; *see also* Osborne v. Ohio, 495 U.S. 103, 110 (1990).

181. *See* Norris, 159 F.3d at 930.

182. *See id.*

183. Stevens, *supra* note 169, at 698.

children involved does not end when the pornographer's camera is put away, . . . "[t]he pornography's continued existence causes the child victims continuing harm by haunting those children" in future years.¹⁸⁴ The states have a compelling interest to prevent the production of child pornography and the most effective means to stop production is to stop the market that has "led to the creation of the images in the first place."¹⁸⁵ Therefore, by punishing those who have a direct link to the production of child pornography, SB 1442 is taking the least restrictive way of lessening the harm suffered by exploited children.

B. *The Commerce Clause Implications*

Article I, Section 8 of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁸⁶ The Commerce Clause is an enabling power given to Congress to regulate nearly any activity, as long as it involves interstate commerce.¹⁸⁷ Conversely, the Dormant Commerce Clause is a judge-made doctrine which recognizes a state's interest in safeguarding the health and safety of its citizens, but prevents states from discriminating against interstate commerce.¹⁸⁸ The Dormant Commerce Clause is a blocking power which limits a state's ability to regulate interstate commerce.¹⁸⁹ Precisely, "the [D]ormant Commerce Clause's fundamental objective [is to] preserve[] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors."¹⁹⁰

There have been numerous courts which invoke the Dormant Commerce Clause to overrule legislation which prohibited the transmission of pornographic material.¹⁹¹ The rationale being that a state regulation of the Internet must fall within the broad enabling powers of regulating interstate commerce.¹⁹² However, the Court in *People v. Foley*¹⁹³ found that while the Internet was a part of interstate commerce, the regulation of communication

184. *Norris*, 159 F.3d at 929–30.

185. *United States v. Tillmon*, 195 F.3d 640, 644 (11th Cir. 1999).

186. U.S. CONST. art. I, § 8.

187. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

188. *See id.* at 623.

189. *See id.*

190. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

191. *See, e.g., Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997).

192. Julie Sorenson Stanger, Comment, *Salvaging States' Rights to Protect Children from Internet Predation: State Power to Regulate Internet Activity Under the Dormant Commerce Clause*, 2005 BYU L. REV. 191, 220 (2005).

193. 731 N.E.2d 123 (N.Y. 2000).

over the Internet does not necessarily burden interstate commerce.¹⁹⁴ Further, the United States Supreme Court uses the “Pike balancing test” to determine if the regulation burdens interstate commerce.¹⁹⁵ This test requires a state to illustrate that there is a legitimate local public interest in the regulation of the activity and there is not an excessive burden on interstate commerce.¹⁹⁶

In *New York v. Ferber*,¹⁹⁷ the United States Supreme Court held that “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”¹⁹⁸ SB 1442 allows for compensation for victims who suffer psychological and physical injury as a result of online sexual exploitation which satisfies the first prong of the “Pike balancing test.”

In *Pike v. Bruce Church, Inc.*,¹⁹⁹ the Court held the criteria for determining whether legislation burdens interstate commerce is as follows:

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.²⁰⁰

SB 1442 has an interest in providing “protections in civil and criminal proceedings” to the victims of child exploitation.²⁰¹ The state has a local interest to lessen the harm suffered by exploited children, and by punishing the direct source of exploitation without banning pornography altogether, it allows SB 1442 to have a minimal impact on interstate activity.

V. THE IMPACT OF SENATE BILL 1442

According to the Office of the Attorney General (OAG), because of SB 1442, there are over thirty children who will be able to seek OAG representa-

194. *Id.* at 132–33.

195. *See generally* *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)

196. *Id.* at 142. The “Pike balancing test” emerges as a general rule that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.*

197. 458 U.S. 747 (1982).

198. *Id.* at 756–57 (quoting *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 607 (1982)).

199. 397 U.S. 137 (1970).

200. *Id.* at 142.

201. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

tion, qualify for victim compensation, and seek damages against the producers, promoters, or possessors of child pornography.²⁰² SB 1442 will make the State of Florida the first to enact legislation protecting victims from the distribution and possession of child pornography.²⁰³ Further, SB 1442 impacts victims and the State of Florida in three respects: socially, economically, and physically.²⁰⁴

A. *Victim Relief*

Presently, child pornography is seen as a victimless crime in which victims do not receive financial, emotional, and physical support.²⁰⁵ Further, these victims are not provided with information regarding criminal and civil cases surrounding their exploitation or with the opportunity to be heard at trial.²⁰⁶ However, a “victim” is “anyone who suffers either as a result of ruthless design or incidentally or accidentally.”²⁰⁷ SB 1442 identifies the children of sexual exploitation as the victims and provides criminal and civil relief.²⁰⁸

First, SB 1442 will have an immense social impact on victims and their families.²⁰⁹ SB 1442 will compel officers to provide information and images to the NCMEC and CVIP, and to request any information from the NCMEC in order to identify and contact any victims.²¹⁰ Further, such information is to be entered into the Victims in Child Pornography Tracking Repeat Exploitation database which will expand registry information to prevent and protect children and their families.²¹¹ Moreover, SB 1442 allows victims the use of a pseudonym in both court proceedings and records which allows them to maintain their privacy while still having a voice at trial.²¹² Additionally, SB 1442 increases provisions relating to exploitation of children using a computer.²¹³ These changes will increase the protections for victims, make it harder for children to be reached and exploited, improve law enforcement’s

202. *Id.* at 2.

203. *McCullum*, *supra* note 105.

204. *See generally* SB 1442 Bill Analysis and Impact Statement, *supra* note 11.

205. *McCullum*, *supra* note 105.

206. *Id.*

207. *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998).

208. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 1.

209. *See generally id.*

210. *Id.* at 2.

211. *Id.* at 6.

212. *Id.*

213. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 6.

ability to investigate child exploitation cases, and ensure that victims maintain a sense of privacy.

Next, SB 1442 will have a positive economic impact on victims and their families. Specifically, SB 1442 creates legislation that allows victims of child pornography to sue a promoter, possessor, distributor, or producer of such images and recover monetary damages of no less than one hundred and fifty thousand dollars, including attorneys' fees.²¹⁴ Additionally, victims will receive compensation for counseling or any mental health treatment as a result of the sexual exploitation.²¹⁵ Further, SB 1442 allows the OAG to pursue cases of child exploitation for the victim, and defendants are prohibited from using the defense that they "did not commit the abuse depicted in the images" in the recovery of damages.²¹⁶ These changes will provide victims with a civil remedy for the possession and distribution of illegal material and will allow them to recover actual damages per incident.²¹⁷

Finally, SB 1442 will have a supportive physical impact on victims.²¹⁸ Particularly, SB 1442 expands the definition of "crime" relating to sexual exploitation over the Internet, amends the definition of "victim" from individuals under the age of sixteen to under the age of eighteen, and adds a definition for "identified victim of child pornography" to mean any person "[w]ho, while under the age of [eighteen], was depicted in any child pornographic image; [w]ho has been identified by law enforcement; and [w]hose image has been provided to the National Center for Missing and Exploited Children's Child Victim Identification Program."²¹⁹ These changes will provide a greater number of individuals to seek redress for personal, physical, or psychological injury from sexual exploitation.²²⁰

B. *The State of Florida*

Currently, there is no state which entitles victims of a state-based child exploitation case to seek remedies in state courts.²²¹ Florida has become one of the leading states in the nation in fighting child exploitation and enacting legislation to prevent and protect children.²²² With the enactment of SB 1442, Florida is "again taking the lead and standing up for these children

214. *Id.* at 7.

215. *Id.* at 8.

216. *Id.* at 7.

217. *See id.*

218. *See* SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 7–8.

219. *Id.*

220. *See id.*

221. *See McCollum*, *supra* note 105.

222. *Id.*

who so desperately need us on their side.”²²³ SB 1442 will have a minimal economic impact and a positive social impact for the State of Florida.²²⁴

SB 1442 will have a minimal economic impact for the State of Florida.²²⁵ According to the OAG, the maintenance of the new database will be managed by existing staff and developed by existing technology, which is cost-effective.²²⁶ Further, the additional casework brought by the new remedies in SB 1442 will be handled by the Civil Litigation and Child Predator Cybercrime units, which will diminish the need for new employees.²²⁷ Lastly, to help compensate costs for continuing litigation, the OAG may “seek reasonable attorney’s fees and costs.”²²⁸ The changes and costs that the State of Florida expects to endure because of SB 1442 will only be an insignificant impact.

Further, SB 1442 will have a positive social impact for the State of Florida. Florida is already one of the leading states to combat child exploitation and child abuse.²²⁹ The enactment of SB 1442 will make Florida the first state to treat children as victims in a state court.²³⁰ Florida, being the leader against cybercriminals,²³¹ will provide a model for the nation which will allow the positive social impact to grow from the State of Florida to the nation as a whole.²³²

VI. RECOMMENDATIONS

Although Florida has taken a stand by enacting SB 1442, the fight against child exploitation has only begun. Both federal and state legislation must continue to grow with the quickly changing times and revolutionized technology. Further, child exploitation is not a state issue nor is it an issue that is only dealt with by the United States. Child pornography is a global issue and requires a global solution.

One of the easiest and most effective ways to prevent child exploitation is to educate children and parents. Knowledge will provide children and parents the ability to recognize a dangerous situation and prevent a potential

223. *Id.*

224. *See* SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 2.

225. *See id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *McCollum*, *supra* note 105.

230. *Id.*

231. *Id.*

232. *See id.*

situation.²³³ Although parents should bear the responsibility for teaching their children safety information, much of the prevention efforts have become school-centered.²³⁴ Research has indicated that school-related programs set to reduce victimization of children have the best effect when the child is in elementary school or younger.²³⁵ Moreover, parents need to know the law surrounding the people who work with children and promote personal safety by asking for background checks and further risk assessment of individuals.²³⁶ Additionally, parents need to know the simplicity for an offender to seduce a child and need to educate their children on the amount of personal information they publicize on the Internet.²³⁷ Parents should also look into installing monitoring devices or restrictions if a child is on the Internet unsupervised.²³⁸

Another easy, yet overlooked, way to prevent child exploitation is through Internet Service Providers (ISPs).²³⁹ ISPs provide the means for which child pornography is accessed and distributed over the Internet; therefore, they should help to find a solution.²⁴⁰ ISPs could begin by removing any obvious illegal material from their server and providing law enforcement with personal information from the contract about who is uploading the material.²⁴¹ Further, ISPs could place a clause in the contractual agreement to forbid the production, possession, or distribution of any obscene material with penalties for any illegal use.²⁴² Moreover, law enforcement agents are having trouble retaining records through ISPs because they are only keeping their records for no more than two days.²⁴³ If ISPs would retain their records or keep track of all contact information from one subscriber, the investigation could continue and prosecution would flow more smoothly.²⁴⁴

Lastly, child exploitation needs a global solution. “[I]n at least twenty-six nations, including Ireland, Hungary, South Africa, and France,” the pos-

233. Nat’l Ctr. for Missing & Exploited Child, Guidelines for Programs to Reduce Child Victimization: A Resource for Communities When Choosing a Program to Teach Personal Safety to Children 4 (1999), available at http://www.missingkids.com/en_US/publications/NC24.pdf.

234. *Id.*

235. *Id.* at 5.

236. *Id.* at 7.

237. Doyle, *supra* note 23, at 139.

238. *Id.*

239. *See id.* at 143.

240. *Id.*

241. *Id.*

242. Doyle, *supra* note 23, at 143.

243. *Id.* at 144.

244. *Id.*

session of images of child exploitation is not a criminal offense.²⁴⁵ Although the United States has taken a stand and enacted legislation to prevent citizens from traveling abroad to engage in child exploitation,²⁴⁶ the possession of such explicit material should be criminalized globally and every nation should join to arrest, convict, and punish those who produce, possess, and distribute child exploitation.

VII. CONCLUSION

Child exploitation laws have come a far way since the 1800s when children were seen as chattels and not people.²⁴⁷ The various rights of children need to be respected and upheld by legislation and the practices of society. Child pornography has become the fastest growing business—estimated to make billions of dollars a year. Florida has repeatedly taken a stand to fight against the exploitation of children, and the enactment of SB 1442 is another way in which Florida is attempting to fix oversights in child exploitation legislation. The NCMEC has identified more than thirty children who will receive additional protections²⁴⁸ because of SB 1442, and hopefully this is a model for the other states to enact similar legislation in the near future. Although SB 1442 is likely to be challenged on constitutional rights, it will more than likely prevail. SB 1442 provides victims and the State of Florida with a positive social and physical impact and a minimal amount of economic impact. There is rarely a simple solution to such a global problem; however, the enactment of SB 1442 is an effective way to combat the growing use of the Internet and technology and to provide a safer place for children.

245. *Id.* at 142.

246. *See* 18 U.S.C. § 2423 (2006).

247. Cohen, *supra* note 12, at 9.

248. SB 1442 Bill Analysis and Impact Statement, *supra* note 11, at 2.